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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

63

No. ~~2~~ 6

WILLIAM L. GRIFFIN, ET AL.,

*Petitioners,*

*vs.*

MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE  
OF MARYLAND

**BRIEF FOR PETITIONERS**

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 26

WILLIAM L. GRIFFIN, ET AL.,

*Petitioners,*

*vs.*

MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE  
OF MARYLAND

**BRIEF FOR PETITIONERS**

**Opinions Below**

The opinions of the Circuit Court for Montgomery County and of the Court of Appeals of Maryland (225 Md. 422, 171 A. 2d 717) appear at R. 72 and R. 76.

**Jurisdiction**

The judgment of the Court of Appeals of the State of Maryland was entered on June 8, 1961. The petition for a writ of certiorari was filed on August 4, 1961 and was granted on June 25, 1962 (R. 84). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

### Question Presented

Whether, consistent with the Fourteenth Amendment, the State of Maryland may utilize its police powers of enforcement, arrest, accusation, and prosecution and its judicial powers of trial and conviction, to administer and effectuate racial discrimination at a licensed accommodation which caters to the general public.

### Statutes Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Article 27, Sec. 577 of the Maryland Code (1957) which provides:

"Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided [however] that nothing in this section shall be construed to include within its provisions the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

### Statement

The instant case had its origins in Greensboro, North Carolina, on February 1, 1960 in the attempt of Negro citizens to obtain equal treatment with that afforded to whites in such public accommodations as food, transportation, entertainment and recreation. On that day, four Negro students at the North Carolina A. & T. College, who had grown increasingly impatient with prevailing practices under which Negro students could not obtain food and re-

freshment served at local stores, determined to seek service at a local lunch counter in Greensboro. This modest incident marked the beginning of widespread efforts in a number of states, including Maryland, to open service for Negroes in places of public accommodation. See Pollitt, *Dime Store Demonstrations*, 1960 Duke L. J. 315. One of those efforts, from which this case arose, took place at the amusement park serving the Nation's Capital.

Glen Echo Amusement Park, the major amusement facility in the District of Columbia area, is located in Montgomery County, Maryland. The Park is operated by a corporation licensed to do business in the State of Maryland (R. 3; 78, n. 1). In the years up to 1960, Glen Echo Park was frequented by white customers only (R. 46-47), with the exception of Negro maids accompanying white children (as long as they "didn't do anything in the park" (R. 41)).

On June 30, 1960, a number of persons, including petitioners, gathered outside the main entrance of the Park to urge publicly that Negro patrons be permitted to use the Park's facilities and to seek service for Negro patrons by peaceable means (R. 59-71). A picket line protesting racial segregation was set up outside the main entrance to the Park (R. 62-63). No tickets of admission were required for entry into the Park (R. 17) and petitioners, young Negro students participating in the Glen Echo protest, entered the Park through the open main gates at about 8:15 p.m. (R. 6-7). While petitioners were generally aware of Glen Echo's long-standing discriminatory policy, they were hopeful that the management would not refuse them service (R. 61-63, 69). Having entered the Park without difficulty, petitioners took seats on the horses and other animals of the carousel and sought to enjoy a merry-

go-round ride (R. 7-8), for which they had in their possession valid tickets of admission (R. 17; 59).<sup>1</sup>

Petitioners, as we have said, were hopeful that the Park would not refuse them the service which it advertised and rendered to the general public. Their attempts at service were not unreasonable, considering that no tickets were required for admission to the Park itself (R. 17), that none of the signs around the Park indicated any discrimination against Negro customers (R. 60), and that in its press, radio and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color (R. 45-46).

It soon developed, however, that petitioners were not going to be able to ride the carousel on which they had taken places. While the carousel remained stationary, petitioners were approached by one Francis J. Collins, (R. 8). Collins was employed by the Glen Echo management as head of the special police force at the Park under arrangement with a private detective service, the National Detective Agency (R. 5, 14-15) and was deputized as a Special Deputy Sheriff of Montgomery County on the request of the Park management (R. 14).<sup>2</sup> Collins was dressed in the uniform of the National Detective Agency and was wearing the Special Deputy Sheriff's badge representing his state

<sup>1</sup> Friends of the petitioners had purchased these tickets and had given them to petitioners (R. 60). There is no suggestion that the management placed any restriction upon the transfer of tickets to friends and relatives; indeed, it was conceded by an agent of the Park that transfers frequently occurred in his presence (R. 17). No offer to refund the purchase price was made to petitioners (R. 17).

<sup>2</sup> The private force at the Park included at least two employees deputized as Special Deputy Sheriffs (R. 55) pursuant to ~~Montgomery County Code (R. 55)~~ pursuant to Montgomery County Code (1955) Sec. 2-91, which provides that the sheriff "on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of . . . such corporation or individual; . . . to be paid wholly by the corporation or person on whose account their appointments are made."

authority (R. 14). On the orders of and on behalf of the Glen Echo management (R. 7, 54), but wearing the badge of his office under the State, Collins "gave them five minutes to get off the property" (R. 7), explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (R. 8). Petitioners declined to obey Collins' order, remaining on the carousel for which they tendered their tickets of admission (R. 8, 17). Having unsuccessfully directed petitioners to leave the premises, and still acting pursuant to his employers' instructions (R. 7, 54) but exercising his police authority (R. A), Collins now arrested petitioners (R. 12) for trespass in violation of Art. 27, Sec. 577 of the Code (R. A). There was no suggestion that petitioners were "disorderly in any manner" (R. 77).

At the Montgomery County Police precinct house where petitioners were taken after their arrest (R. 12), once more acting upon his employers' instructions but exercising his public office, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (R. A). Upon Collins' charge, a "State Warrant" was issued by the justice of the peace (R. B), leading to petitioners' trial under the Maryland "wanton trespass" statute, Code Art. 27, Sec. 577.<sup>3</sup>

Petitioners' trial in the Circuit Court for Montgomery County on September 12, 1960, elicited the circumstances under which petitioners were warned off Glen Echo premises and arrested and accused of trespass by Collins, acting

<sup>3</sup> Apparently the State had difficulty deciding, in view of the continuous commingling of Collins' functions, whether Collins had been exercising his public or his private powers in enforcing segregation at Glen Echo Amusement Park. The State Warrant filed on August 4, 1960 (R. B) alleging that petitioners had refused to leave the Park "after having been told by the Deputy Sheriff for Glen Echo Park" to leave the property, was replaced by an Amended State Warrant of September 12, 1960 (R. C) alleging that they had refused to leave "after having been duly notified by an agent of Kebar, Inc." not to remain on the property.

on the orders of the private management and contemporaneously exercising the powers of his public police office as a Deputy Sheriff. At the trial, Collins, Park co-owner Abram Baker, and Park Manager Woronoff, all elaborated upon the orders given by the management to Collins with respect to his enforcement of racial discrimination. Co-owner Abram Baker admitted that from the first day of Collins' employment, management had instructed him to enforce segregation. (R. 37). Baker candidly described his use of private-employee-deputy-sheriff Collins to enforce racial discrimination:

"Q. Did you instruct Lieutenant Collins to arrest all negroes who came on the property, if they did not leave?

"A. Yes.

"Q. That was your instructions?

"A. Yes.

"Q. And did you instruct him to arrest them because they were negroes?

"A. Yes" (R. 39-40).

Deputy Sheriff Collins equally affirmed that he arrested petitioners "because they were negroes," and explained that "I arrested them on orders of Mr. Woronoff, due to the fact that the policy of the park was that they catered just to white people . . ." (R. 16). Park Manager Woronoff also testified that Glen Echo's policy was "to maintain the park on a segregated basis" (R. 53) and that when he learned of petitioners' presence in the Park, "I instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, then they were to be arrested for trespass" (R. 54).

Petitioners' constitutional objections to the State's par-

participation in and support of racial discrimination, were repeatedly rejected by the trial court (R. 4, 12, 55, 71, 72-75). Petitioners were convicted and fined (R. F; 72-75). The Maryland Court of Appeals affirmed the convictions (R. 76), holding that, under the wanton trespass statute, petitioners' refusal to leave the premises upon instructions of management agent Collins, constituted unlawful "entry or crossing over" the property "after having been duly notified by the owner or his agent not to do so". The Court dismissed petitioners' arguments that State support of racial discrimination by a public commercial enterprise violated the Fourteenth Amendment, finding the case to be "one step removed from State enforcement of a policy of segregation" (R. 82).

This Court has granted review in this and a number of other cases which involve similar or related questions regarding the conviction for crime of young Negroes and their white associates seeking to utilize facilities licensed to provide accommodations to the general public. In addition to the cases granted review, a number of other petitions are pending in this Court and numerous cases are before state courts, all raising related constitutional questions. Because of the importance of the issues presented and the impact of this Court's ruling, which will necessarily have effect beyond the individual cases now before the Court, we enlarge in the Argument on the various legal considerations involved in racial discrimination at public accommodations and its enforcement by the authority of the state.

### Summary of Argument

#### I

The State of Maryland's supportive involvement in the racial discrimination of Glen Echo Park transgresses the equal protection clause of the Fourteenth Amendment.

What the State has done here falls well within the area of State action interdicted by this Court's rulings in *Shelley v. Kraemer*, 334 U.S. 1 and *Barrows v. Jackson*, 346 U.S. 249.

In *Shelley*, and later in *Barrows*, this Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that no less than in *Shelley* and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination. Indeed, the instant case is far stronger than *Shelley*, for here the State's judicial process, indeed its criminal process, has been made available to enforce discrimination not by merely private parties as in *Shelley*, but rather by proprietors of an important accommodation catering to the public at large.

Actually, there is far more in the instant case than mere judicial enforcement of racial discrimination—here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was handed to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. As regards enforcement of segregation, there was absolutely no severance at any time between public and private authority at Glen Echo Park.

Moreover, in addition to the direct involvement of the State in segregation at Glen Echo Park through its police and judicial powers, the State of Maryland was also in-

extricably involved in the surviving community custom of segregation fostered by decades of statutory segregation. We do not believe that Maryland's belated abandonment of compulsory segregation serves to extricate the State from responsibility for a public practice which has survived beyond the era when it was official State policy.

Petitioners' convictions for "trespass", which serve to enforce the racial practice of a licensed business catering to the general public, clearly offend the mandate of the Fourteenth Amendment under authoritative rulings of this Court. None of the arguments advanced in support of the State court rulings in this or the companion cases deny that the practice of segregation is supported and buttressed by the States' involvement in all these cases. Rather, reliance is placed upon three "confession and avoidance" arguments to justify or excuse the admitted State involvement in the discriminatory practices at hand. None of these defensive contentions justifies or excuses the State action here involved in support of racial discrimination.

The State's first contention is that this prosecution and conviction is a neutral manifestation of Maryland's general interest in enforcing "property rights" and that the Fourteenth Amendment is not violated unless the State's purpose, as well as its effect, is to give support to discrimination. But discriminatory "motivation" by the State can hardly be the *sine qua non* of the Fourteenth Amendment's applicability when as a matter of fact the exercise of the State's power supports and abets racial discrimination. In any event, in the instant case it is clear that not only the effect but also the purpose of the State's "neutral" action has been to give support to Glen Echo's racial policy. Having put its police authority under the orders and control of the Park for enforcement of

racial discrimination, the State cannot now be heard to disavow the owners' racial purpose.

To the second contention, that application of the *Shelley* principle in the instant cases would leave states helpless to defend the sanctity of the home and the privacy of its owner, the direct answer is that these cases do not involve the home. Far from seeking privacy, the establishments involved in these cases are open to and cater to the trade of the public at large. See *Marsh v. Alabama*, 326 U.S. 501. There is no privacy to be protected in a place of public accommodation catering to thousands of amusement-seekers.

To the third argument, that proprietors will utilize forcible self-help to eject Negroes if they cannot do so through the police, we submit that the public record demonstrates the unlikelihood of any such action. For it is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." There is every reason to believe that the removal of state support for discrimination will be the occasion not for the advent of forcible self-help but for the demise of segregation in public accommodations. And all apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be patrons.

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of

trial and conviction to administer and effectuate racial discrimination at an amusement park catering to the general public. None of the hypothetical or practical arguments advanced in support of the state court rulings in this and the companion cases permits a state by police or judicial action to aid in the enforcement of a policy of segregation at places of public accommodation.

## II

States may not, consistent with the equal protection guarantee, permit racial discrimination at public accommodations. Only a few months ago, Mr. Justice Douglas, in a concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 176, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public, and concluded (182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility."

The equal protection clause applies when "to some significant extent the State in any of its manifestations has been found to have become involved" with a private enterprise engaging in racial practices. *Burton v. Wilmington Parking Authority*, 365 U.S. 715. Analysis demonstrates that the State of Maryland is intimately involved in such public accommodations as Glen Echo. In its varied licensing and inspection requirements for the protection of the public interest and welfare, the State of Maryland has manifested its high concern regarding the operation of Glen Echo. In its many regulatory measures relating to the enterprise, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved. But the State's involvement does not

end with licensing, inspection and regulation; in a myriad of ways governments provide assistance to public accommodations. These varying measures of governmental assistance once more demonstrate the state's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

The State has obviously "become involved" in the operation of public accommodations licensed, regulated and supported by its agencies. The "private property" concepts which underlay this Court's refusal in the 1883 *Civil Rights Cases* to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the question whether the State of Maryland may permit public accommodations to discriminate against Negroes. No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases. Cf. *Nebbia v. New York*, 291 U.S. 502.

One hundred years after Emancipation, the effort at true emancipation cannot succeed while great public enterprises, operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community. As history has proved Justice Harlan correct in his dissent in *Plessy*, it has also corroborated his forebodings in the *Civil Rights Cases* about a ruling which, under the guise of "proprietor's rights," carved from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations. Any reappraisal today leads inexorably to the

conclusion that state law must afford the Negro public equal service at places of public accommodation.

### Argument

In this case members of the general public, which the Glen Echo Amusement Park is licensed to and purports to serve, were refused accommodation and treated as trespassers by the Park solely because they were Negroes. The State of Maryland freely lent its authority for the administration and enforcement of the discriminatory policy at the Glen Echo premises, and prosecuted and convicted petitioners of the crime of refusing to leave the establishment. There are thus presented two fundamental questions under the equal protection clause: *First*, assuming that Glen Echo was legally and constitutionally free to discriminate against Negro members of the public, may the State actively support Glen Echo's discriminatory practice in the manner and to the degree it did here? *Second*, consistent with the Fourteenth Amendment, may Maryland law, statutory or common, permit Glen Echo, a licensed place of public accommodation catering to the general public, to discriminate against Negro members of the public and to refuse them service solely because of their race?

We believe the Court need go no further than the first of these two questions. In the light of the State's very clear involvement in the administration and enforcement of segregation at Glen Echo, there is presented here a direct state transgression of the equal protection clause, which requires no broad ruling nor reconsideration of this Court's decision in the *Civil Rights Cases*, 109 U.S. 3. Since a narrow constitutional issue under *Shelley* and related decisions is presented by the first question concerning the State's supportive involvement in racial discrimination,

at Glen Echo, it is unlikely that the Court will reach the second and larger question. We note, however, that one member of the Court (see opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, 176) recently dealt in a concurring opinion with the broader question whether a public accommodation is legally and constitutionally permitted to discriminate against the Negro public. For this reason, as well as for the sake of completeness and because the answer to the second question may serve to illuminate the first, we advance for the Court's consideration the reasons why state law cannot permit exclusion of persons because of their race from a licensed place of public accommodation which caters to and renders an important service to the general public. This ground of decision would, of course, require critical reappraisal of the Court's rationale in its 1883 opinion in the *Civil Rights Cases*. However, if this second question were resolved in petitioners' favor as we believe it would have to be, such a ruling would provide a uniform resolution of the pending cases, for it would require establishments purporting to serve the public equally to serve Negro members of the public. The Constitution, in our view, not only permits Negro members of the public to sit on the carousel free of state interference, but also requires management to operate it for their benefit as it does for whites. For these reasons we have deemed it important to brief both questions for the Court's consideration.

# I

## **The State's Supportive Involvement in the Racial Discrimination of Glen Echo Park Transgresses the Equal Protection Clause of the Fourteenth Amendment.**

The instant case is one of a number of proceedings challenging state prosecutions of Negro patrons and white associates at places of public accommodation. The first

premise of the challenge against the criminal proceedings involved in the pending cases is that such exertions of state power in support of the racially discriminatory practices of enterprises serving the public, constitute "state action" forbidden by the Fourteenth Amendment. What the states have done in all these cases falls well within the area of state action interdicted by this Court's rulings. See *Shelley v. Kraemer*, 334 U.S. 1, and *Barrows v. Jackson*, 346 U.S. 249.

(1) Long before *Shelley*, this Court emphasized that the Fourteenth Amendment's requirement of equal treatment by the state reaches "state action of every kind"—legislative, executive and judicial. See *Virginia v. Rives*, 100 U.S. 313, 318; *Ex Parte Virginia*, 100 U.S. 339. In *Shelley* and later in *Barrows*, the Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that no less than in *Shelley* and *Barrows*, the courts of the State of Maryland have become the means for enforcing racial discrimination. Nor is it any answer to say that the State courts are merely vindicating "property rights": for this Court has explicitly answered that contention in *Shelley*, ruling that the Fourteenth Amendment circumscribes "the power of the state to create and enforce property rights." We submit that *Shelley* controls the instant case and precludes the affirmance of criminal convictions for "trespass" of persons ordered off premises and arrested and accused "because they were Negroes."

(2) Moreover, the instant case is far stronger than

<sup>4</sup> This was the holding of the Third Circuit, one directly contrary to the ruling below under similar factual circumstances, in *Valle v. Stengel*, 176 F. 2d 697.

*Shelley*, for here the State's judicial process, indeed its criminal process, has been made available to enforce discrimination not by merely private parties as in *Shelley*, but rather by proprietors of an important accommodation catering to the public at large. If, as this Court's *Shelley* ruling held, state courts may not lend their powers to the enforcement of discrimination as between merely private parties, they may do so *even less* to enforce discrimination at premises licensed for, advertised, and dedicated to the custom of the public.<sup>5</sup>

This is the position well articulated and elaborated before this Court in a brief amicus for the United States two terms ago. In *Boynton v. Virginia*, 364 U.S. 454, the Solicitor General urged reversal of a Virginia trespass conviction upon the ground being urged in the pending cases, that the Fourteenth Amendment precludes a state's enforcement of racial discrimination by a business catering

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<sup>5</sup> The case here is rendered particularly strong by the fact that a state-licensed enterprise of public accommodation has been the beneficiary of state support in its discrimination. Thus it would hardly be argued that a state may license public accommodations expressly to serve the white public. Yet, while the State's license here may in form be neutral, when the State through its courts enforces racial segregation at the licensed premises, then *in effect* the State has licensed and authorized an enterprise to provide accommodations to the white public alone.

This the State clearly may not do. As Mr. Justice Douglas stated in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 184: "I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as the whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public." ○

to the public. In the Government's Brief before this Court (at p. 17), the Solicitor General emphasized that "The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment." Pertinent judicial rulings, the Solicitor General pointed out, demonstrate that *"where the state enforces or supports racial discrimination in a place open for the use of the general public . . . it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct"* (at p. 20). The Solicitor General concluded that the conviction for "trespass" of a Negro seeking service at a Richmond, Virginia, restaurant constituted unlawful state support to private discrimination, and that

"When a state abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right 'to make and enforce contracts' and 'to purchase personal property' guaranteed by 42 U.S.C. 1981 and 1982 against deprivation on racial grounds" (at p. 28).

Since in the instant case the State court judgment of conviction constitutes direct enforcement at a public accommodation of segregation against members of the public treated as trespassers "because they are Negroes", the authoritative rulings of this Court preclude an affirmance of the judgment below.<sup>6</sup>

<sup>6</sup> An additional ground for reversal may inhere in the fact that the highest court of Maryland has here construed the Maryland enactment "as authorizing discriminatory classification based exclusively on color." See

(3) Actually there is far more in the instant case than mere *judicial* enforcement of racial discrimination—here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was handed to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. Deputy Sheriff Collins, not upon the mere request but upon the *orders* of the private management which employed him, and wearing the badge of his public office, informed and instructed petitioners that because they were Negroes they would have to leave the premises. Collins and his associates were thus administering the Park's policy of racial discrimination on a day to day basis. Collins' direction to the petitioners to leave the premises constituted unconstitutional state involvement in the "private" practice of discrimination.<sup>7</sup>

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concurring opinion of Mr. Justice Stewart in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726. But for the State trespass statute, petitioners' conduct would not have been a crime. As construed below, the statute requires the conviction of one who remains on property "after having been duly notified by the owner or his agent not to do so" *because he is a Negro*. Thus, as construed below, the statute clearly authorizes a discriminatory classification based exclusively on color.

<sup>7</sup> The court below found Deputy Sheriff Collins' involvement in administering segregation at Glen Echo no different than that of a regular police officer casually called upon for assistance by management (R. 82). While in our view the Constitution precludes either type of police involvement in administering racial segregation at public accommodations, it must be noted that the two situations are not identical. Unlike the policeman requested to make an arrest for trespass, the police power here was under the pay and control of the private management which ordered Deputy Sheriff Collins to administer its discriminatory policy (R. 16). In this commingling of public and private powers at Glen Echo, there was irretrievably surrendered the discretion and integrity ordinarily attaching to the policeman's badge. It seems clear (Cf. *Steele v. Louisville & Nashville*

Indeed, it was officer Collins who created the crime of which petitioners were convicted. His direction to petitioners to leave the premises was a necessary ingredient of the offense under the statute, which is committed only "*after having been duly notified by the owner or his agent.*" Then, to add even further state support, still following the orders of his employers and in his capacity as an officer of the State, Collins arrested petitioners and filed warrants under oath against them, bringing into play the prosecutorial machinery of the State.<sup>8</sup>

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*R. Co.*, 323 U.S. 192; *Marck v. Alabama*, 326 U.S. 501) that the loan of the State's police badge is accompanied by a constitutional prohibition on its use for the enforcement of "private" racial practices.

<sup>8</sup> Collins, who was under the orders of his private employers to accuse petitioners of trespass, did so in his public capacity. This is reflected in the "Application for Warrant by Police Officer" (R. A), filed by Collins on his sworn allegation "that he is a deputy sheriff . . . and as such . . . did observe" the alleged offense, and in the State Warrants (R. B, C) reciting that "complaint hath been made upon the information and oath of Lieutenant Collins, Deputy Sheriff . . ."

While the court below points out (R. 82) that Collins might have filed his accusation in his private capacity, it is significant that he did not. Maryland employs an accusatory system in petty offenses based upon the discretionary authority of justices of the peace to arraign persons for trial upon complaint to them of an offense having been committed. Code Article 52, Sections 13 to 25. One who persuades a justice of the peace "in his discretion" (Art. 52, Sec. 23) to issue a state warrant, has procured the trial of the accused in the absence of further affirmative action to amend or dismiss the warrant, by the justice of the peace (Art. 52, Sec. 22) or the trial court (Art. 52, Sec. 13; in Montgomery County Art. 52, Sections 25 and 99). That the justice of the peace is influenced in the exercise of his discretionary accusatory power by the fact that a police official is the complainant, is indicated by his maintenance of a separate form of "Application for Warrant by Police Officer" which, unlike the form used by private applicants, requires no listing of other witnesses, is issued in part on the basis of unsworn verbal representations to the justice by the officer of the law, and on his oath that "as a member of the Montgomery County Police Department," he believes the accused guilty (R. A). In these circumstances, it cannot be said that, in the exercise of the justice of the peace's discretionary power to accuse petitioners and thus to bring them to trial, it was inconsequential that the complaint made by Collins, pursuant to his employers' orders, was in his official capacity as a police officer.

It could hardly be more obvious, we submit, that as regards enforcement of segregation there was absolutely no severance at any time between public and private authority at Glen Echo Park. The Park's policy of racial discrimination was at all times being administered and enforced by the State through Deputy Sheriff Collins and his colleagues. Here the State of Maryland was not merely enforcing racial discrimination through prosecution in the courts, but was itself administering that discrimination on a day to day basis at the premises of the largest public amusement facility in the District of Columbia area. Cf. *Pennsylvania v. Board of Trustees*, 353 U.S. 230. Indeed, but for the State's ready support, the management might not have discriminated against the Negro patrons. Actually, shortly after that State support was challenged in the instant case and in a Federal suit filed by Negro patrons to bar further arrests at Glen Echo (*Griffin v. Collins*, Civil Action No. 12308, D. C. Md. (1960)), the Park abandoned its practice of segregation (see *Washington Post*, March 15, 1961, p. 1, col. 2).

As this Court recently phrased the presently applicable principle in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, the equal protection clause comes into play when "*to some significant extent the State in any of its manifestations has been found to have become involved*" in private conduct abridging individual rights. The applicability of this rule is clear and direct where, as here, the State has become involved through police administration and enforcement of the day to day operation of the Park's discriminatory policies.<sup>9</sup>

<sup>9</sup> It is also plain that the decision in the *Civil Rights Cases*, 109 U.S. 3, has no bearing upon the issue of such police administration and enforcement of racial segregation at public places. As the Court there took pains to point out (pp. 19, 21), that case was resolved "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public

(4) Moreover, in addition to the direct involvement of the State in segregation at Glen Echo Park through its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction, the State of Maryland was also inextricably involved in the surviving community custom of segregation fostered by decades of statutory segregation. In the companion cases coming from Southern States, there are urged strong constitutional considerations arising from the involvement of those States in the prevailing custom of segregation at public establishments through a variety of existing segregation statutes and ordinances. While Maryland, with its more "Northern" orientation, has repealed some segregation statutes and has ceased to enforce others, it is relevant that not too long ago the State still required segregation in many areas of public life and even yet has not fully desegregated its public schools. We do not believe that Maryland's belated abandonment of compulsory segregation serves to extricate the State from responsibility for a public practice which has survived beyond the era when it was official State policy.<sup>10</sup>

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conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with," and that it was not presented with the issue whether denial of equal service at such establishments "might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment" (emphasis supplied).

<sup>10</sup> Maryland was a slave-holding, border State. Its code of segregation laws historically has not been materially distinguishable from the Jim Crow laws of Southern States. A number of these segregation statutes have been repealed. (See Ann. Code of Maryland 1939, Art. 27 § 510-526, segregation on railroads and steamboats; Laws of Maryland, 1951, Chapter 22, p. 58.) There remain on the books however a number of segregation statutes. See e.g. Ann. Code of Maryland 1957, Art. 65A, § 1-4; Art. 49B, § 5; Art. 78A, § 14; Art. 77, § 279; Art. 27, § 655; Art. 77, § 226; Art. 27, § 646-648; Art. 27, § 393; and Art. 27, § 398. As recently as 1937 the Court of Appeals of Maryland held that "separation of the races is

(5) Petitioners' convictions for "trespass", which serve to enforce the racial practice of a licensed business catering to the general public, clearly offend the mandate of the Fourteenth Amendment under authoritative rulings of this Court. None of the arguments advanced in support of the State court rulings in this or the companion cases deny that the practice of segregation is supported and buttressed by the States' involvement in all these cases. Rather, reliance is placed upon three "confession and avoidance" arguments to justify or excuse the admitted State involvement in the discriminatory practices at hand: First, it is asserted that the state's support to discrimination by criminal actions and convictions for trespass, is merely the state's "neutral" vindication of property rights for whatever cause the owner may invoke them; second, it is urged that *Shelley* should not be applied to trespass situations because states would otherwise be powerless to protect the sanctity of the home and its privacy; third, it is argued that if this Court holds states powerless to enforce discrimination at public accommodations, private proprietors will resort to forcible self-help for continued discrimination against Negroes. We turn to a brief answer to each of these defensive contentions.

(a) "*Neutral*" Vindication of Property Rights. The

normal treatment in this state" (*Williams v. Zimmerman*, 172 Md. 563, 192 A. 353).

The 1957 Annual Report of the Commission on Interracial Problems and Relations to the Governor and General Assembly of Maryland (p. 13) portrayed a pattern of segregation in Baltimore by which Negroes were excluded or segregated at 91% of all public facilities. The Baltimore picture, the Commission held, "would certainly reflect a pattern which exists in greater degrees of discrimination throughout Maryland's twenty-three counties." In its 1962 Report (at p. 23) the Commission reported that "the process of voluntary desegregation, in the absence of lawful regulation, has proved slow and inconsistent." Today's custom, though it may be attenuated and though it may no longer have the full force of law is certainly derived from recently-enforced statutory enactments of the State of Maryland.

court below ruled that the arrest and conviction of petitioners "as a result of the enforcement by the operator of the park of its lawful policy of segregation," could not "fairly be said to be" the action of the State. In so doing, the court below apparently accepted the contention of the State that this prosecution and conviction is a neutral manifestation of Maryland's general interest in enforcing "property rights," devoid of any racial connotation. This contention does not question that the exercise of the State's power has had the effect of supporting the practice of racial discrimination; rather, it suggests that the Fourteenth Amendment is not violated unless the State's purpose is to give support to discrimination.

But discriminatory "motivation" by the State can hardly be the *sine qua non* of the Fourteenth Amendment's applicability when as a matter of fact the exercise of the State's power supports and abets racial discrimination. The courts of Maryland convicted petitioners with clear understanding that racial discrimination was being enforced. Nowhere in the restrictive covenant decisions or in the formulation in *Wilmington Parking Authority* is a motive requirement suggested; recently, in *Gomillion v. Lightfoot*, 364 U.S. 339, this Court rejected a similarly confining motivational interpretation of the Fourteenth Amendment's equality guarantee. The contention that the state is neutrally enforcing property rights rather than intending to assist discrimination, was explicitly rejected in *Shelley*, (334 U.S. 1, 22), this Court emphasizing that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."<sup>11</sup>

<sup>11</sup> There may be some concern that this Court's ruling in *Shelley* would give constitutional import, outside the area of racial discrimination, to situations where state courts enforce private relationships characterized by unfairness which would offend the due process clause were the state its

In any event, in the instant case it is clear that not only the effect but also the purpose of the State's "neutral" action has been to give support to Glen Echo's racial policy. The State surrendered its police authority to the use and control of a private corporation for its enforcement of racial discrimination. Armed with police authority, Deputy Sheriff Collins obeyed the orders of his employers in seeking to expel and thereafter in arresting and charging petitioners for trespass. Acting under color of law, Collins had as his sole purpose the administration of discrimination; he admittedly ordered petitioners off the premises and arrested and accused them "because they were Negroes" (R. 46; 39-40). The State's police authority was thus prostituted to the management's racial purpose. Having put its police authority under the orders and control of the Park for enforcement of racial discrimination, the State cannot now be heard to disavow the owners' racial purpose.

(b) *Protecting the Privacy of the Home.* To the contention that application of the *Shelley* principle in the instant cases would leave states helpless to defend the sanctity of the home and the privacy of its owner, the direct answer is that these cases do not involve the home. Far from seeking privacy, the establishments involved in these cases are open to and cater to the trade of the public at large. This Court has had occasion to emphasize pre-

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initiator. While the question is not, of course, presently before the Court, it might be noted that, in contrast to its flexible approach to due process under the Fourteenth Amendment, this Court has accorded categorical significance to the racial prohibition of the Equal Protection Clause. The Court may validly make the same distinction as regards state judicial enforcement of "private" racial discrimination, on the one hand, and of "private" relationships characterized by arbitrariness or unfairness, on the other. Such a distinction would do no violence to the intention of the Fourteenth Amendment, which may be said in the area of race to seek the achievement of a desegregated social order (see *infra*, pp. 30 to 39), but to address itself in matters of fairness only to the "due process" of the state itself rather than to legislate a fair or just society.

cisely this distinction. In *Marsh v. Alabama*, 326 U.S. 501, the Court ruled that the exertion of state criminal authority on behalf of a proprietor's restriction on the liberties of a member of the general public on his premises was precluded by the Fourteenth Amendment. As the Court pointed out (at 505-506): "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." See also *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 464, where the Court dismissed the contention that the Constitution secures to a passenger on a public vehicle "a right of privacy substantially equal to the privacy to which he is entitled in his own home." Privacy, said the Court, "is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

*Marsh* and *Pollak* highlight the significance attaching to the fact that in the pending cases racial discrimination is being enforced by states on behalf of public establishments rather than on behalf of individuals, homeowners or associations seeking protection of rights of private possession or personal privacy. As the Government's brief affirmed with respect to a similar trespass prosecution in the *Boynton* case (at pp. 20, 22), the Fourteenth Amendment is infringed where the state "enforces or supports racial discrimination in a place open for the use of the general public," for the issue

"is not whether the right, for example, of a homeowner to choose his guests should prevail over peti-

tioner's constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interest of a proprietor who has opened up his business property for use by the general public—in particular, by passengers travelling in interstate commerce on a federally-regulated carrier—should so prevail."

Glen Echo Amusement Park is a licensed business enterprise owned and operated by corporations chartered by the State of Maryland. It caters to the general public as the major amusement park in the District of Columbia area and none of its numerous advertisements through various means of public communication reflected any discrimination against Negro members of the public and no signs around the Park proclaimed any restriction upon the custom of Negro patrons. These factors underline the critical consideration in the instant case that the State's power has been invoked to enforce not personal privacy but public discrimination—to assist a business catering to the general public in its refusal of service to Negro members of that public. But he who seeks privacy must practice privacy. To the argument that rights of "privacy" must be given predominant standing here, the simple answer is that there is no privacy to be protected in a place of public accommodation catering to thousands of amusement-seekers. Cf. *Public Utilities Com'n v. Rollak*, 343 U.S. 451, 464.

(c) *Segregation By Forceful Self-Help*.<sup>12</sup> In its public

<sup>12</sup> The Supreme Court of North Carolina suggested in the *Avent* case that if an owner cannot bar Negroes "by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must." There is no issue of self-help directly involved in these cases and what we suggest in the text is that the contention is not only legally irrelevant but

school desegregation decisions this Court evidenced its concern regarding the impact of a constitutional ruling requiring widespread changes in local custom and practices. On this score, we submit that the public record demonstrates the unlikelihood of serious disturbance or danger attending the removal of state support to discrimination in public accommodations. For it is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." The recent wholesale abandonment of racial practices of the business community in many Southern localities, demonstrates that these practices are less the product of public attitudes or business necessity than the vestigial remains of former conditions, succored by the willingness of public authorities to enforce segregation. There is every reason to believe that the removal of state support for discrimination will hasten the demise of segregation in public accommodations.

Prior to February, 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in sixty-nine cities had abandoned discriminatory practices (*The New York Times*, August 11, 1960, p. 14, col. 5); by October of 1960, the number of recently desegregated municipalities had mounted to more than one hundred (*The New York Times*, Oct. 18, 1960, p. 47, col. 5). During 1961 and 1962, desegregation has steadily continued.<sup>13</sup>

There is also direct evidence that removal of legal sanc-

tion is factually baseless. Indeed, in Durham, North Carolina, where *Avent* arose, the dime stores have since quietly abandoned discrimination.

<sup>13</sup> See e.g. *The New York Times*, Feb. 7, 1962, p. 40, col. 5 (Memphis); *The Washington Post*, April 9, 1962, p. 5, col. 2 (Houston); *The Washington Post*, Sept. 13, 1962, p. 18, col. 1 (New Orleans).

tions supporting segregation in public places effectively obviates further conflict or difficulty. When state segregation laws were struck down, public libraries in Danville, Virginia, and Greenville, South Carolina, were closed to avoid desegregation; they reopened a short time later, first on a "stand up only" basis and then on a normal basis, all without incident. When public swimming pools were judicially ordered to desegregate, those in San Antonio, Corpus Christi, Austin, and others integrated without difficulty. See Pollitt, *The President's Powers in Areas of Race Relations*, 39 N.C.L. Rev. 238, 275. Similarly, Miami Beach, Houston, Dallas and other communities integrated their public golf courses without incident. *Ibid.* And experience has likewise disproved the *in terrorem* argument against desegregation suggested in cases involving Pullman cars (*Mitchell v. United States*, 313 U.S. 81), dining cars (*Henderson v. United States*, 339 U.S. 816), buses (*Morgan v. Virginia*, 328 U.S. 373), and air travel and terminal service (*Fitzgerald v. Pan American World Airways*, 229 F. 2d 499; *Nash v. Air Terminal Services*, 85 F. Supp. 545).

In the instant case, no possible difficulty could arise from this Court's invalidation of State support for segregation at Glen Echo.<sup>14</sup> The Park abandoned its prior racial practices in 1961 (see *The Washington Post*, March 15, 1961, p. 1, col. 2) and Montgomery County recently adopted a public places law (Ordinance 4-120, adopted by County Council, January 16, 1962). Unquestionably, an element in the man-

<sup>14</sup> As the trial judge himself observed in his opinion (R. 74):

"If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision . . ."

agement's abandonment of discrimination was petitioners' challenge to the State's enforcement of discrimination. The national evidence equally demonstrates that state enforcement provides the essential buttress for continued racial discrimination at places of public accommodation.<sup>15</sup>

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction to administer and effectuate racial discrimination at an amusement park catering to the general public. None of the hypothetical or practical arguments advanced in support of the state court rulings in this and the companion cases permits a state, by police or judicial action, to aid in the enforcement of a policy of segregation where broad public interests are involved. The quantum of state action here far exceeds that which this Court found adequate to bring into play the Equal Protection clause in earlier cases. We submit that under the Fourteenth Amendment Maryland cannot convict Negro youngsters of criminal trespass merely because they have sought to ride the merry-go-round in a place of public accommodation.

<sup>15</sup> All apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be patrons. A court would not afford equal protection of the laws if it gave effect to the defense of self-help in an action for assault where the use of force was predicated upon racial discrimination. As this Court said in *Barrows v. Jackson*, 346 U.S. 249 at 256, "The result of that sanction [damage awards] by the State would be to encourage the use of restrictive covenants." By the same token, giving effect to the legal defense of self-help would be to encourage discrimination at accommodations open to the public. Furthermore, since any power or right of self-help is necessarily derived from the state, its exercise on grounds of race would appear questionable to say the least.

## II

## States May Not, Consistent With the Equal Protection Guarantee, Permit Racial Discrimination At Public Accommodations.

In the preceding section of the Argument we have developed the considerations which preclude the State from enforcing, through its police powers of enforcement, arrest, accusation, and prosecution and its judicial powers of trial and conviction, racial discrimination at places of public accommodation. The discussion under Point I has proceeded on the assumption, *arguendo*, that the State may legally and constitutionally permit the proprietor of an establishment serving the public to discriminate against the Negro public so long as the State by police or judicial action does not aid in the enforcement of such discrimination. But the assumption that State law, statutory or common law, can consistent with the Fourteenth Amendment permit a public accommodation to pursue a "lawful policy of segregation" (R. 82) is itself subject to the most serious question. We submit that if this Court should reach this question in the present cases, it would be confronted with the ultimate issue lurking in the background of our developing law of equal protection: *Whether state law which permits or authorizes racial discrimination by establishments providing public accommodations is consistent with the constitutional mandate of equal protection.*<sup>16</sup>

<sup>16</sup>The court below refers to the enforcement of *Giles Echo's* "lawful policy of segregation" (R. 82)—a phrase which sharply points up the truly state-derived foundation of the so-called "right" to discriminate. For, if a public accommodation may "lawfully" discriminate against the Negro public, it is only because the state has permitted it so to do by its substantive law of proprietors' rights. But it is the teaching of *Shelley*, and even more clearly of *Barrows*, that the law of the state (whether statute or common law) may not give recognition to racial discrimination, except in areas clearly within the personal domain such as the privacy

Only a few months ago, a member of this Court found this ultimate issue presented for adjudication in *Garner v. Louisiana*, 368 U.S. 157, 176. Mr. Justice Douglas, in a concurring opinion, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public, and concluded (182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." We submit that no other conclusion can properly be reached, and that if the Court should review the questions it must rule that Maryland cannot permit Glen Echo to discriminate against petitioners because of their color and refuse them service at its premises.

The constitutional mandate for applying equal protection guarantees to places of public accommodation, was brilliantly set forth eighty years ago in Justice Harlan's historic dissent in the *Civil Rights Cases*, 109 U.S. 3. A review of the status of such establishments under law and in the social order led Justice Harlan to the view that the moving purpose of the Emancipation Amendments would be subverted were their ambit to exclude carriers, inns and similar public accommodations:

"In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns and managers of places

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of the home. In our view, expanded in the text above, it matters not whether the question arises in an owner-instigated prosecution or suit to expel Negroes; in a suit by Negroes to obtain admission to the premises, or in the day-to-day operation of the establishment without judicial intervention. Where genuine public interests are involved, as they are in each of these situations, under the Fourteenth Amendment the substantive law of the state cannot tolerate segregation and must require that accommodations chartered for and catering to the service of the public, refrain from discrimination against Negro customers.

of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights, secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States" (109 U.S. 3, 58).

However, a majority of the members of the Court in that era took a narrower view and, dividing persons into immutable categories of "official" and "private", found proprietors of public accommodations to fall within the latter category for purposes of the Equal Protection guarantee.

The mechanistic approach of the Court's majority in the *Civil Rights Cases* (and soon after in *Plessy*) has not survived modern exigencies evoking this Court's more recent adjudications. Beginning with the landmark voter discrimination cases (*Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649) and going on through *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, and a series of subsequent rulings, this Court has applied the rule that when government has its "thumb on the scales," private conduct may become infused with the requirement of equal treatment. Such infusion has been found by the Court in areas of contracts (*Steele, supra*; *Shelley, supra*), transportation (*Henderson v. United States*, 339 U.S. 816), education (*Pennsylvania v. Board of Trustees*, 353 U.S. 230; and see *Cooper*,

v. *Aaron*, 358 U.S. 1, 19) and most recently in the case of a state-assisted public accommodation (*Burton v. Wilmington Parking Authority*, 365 U.S. 715). In the case last named, the Court warned that the equal protection requirement would apply when "*the State in any of its manifestations has been found to have become involved*" with a private enterprise engaging in racial practices.

In the present more refined formulation of the degree of state action necessary to bring "private action" within the reach of the Fourteenth Amendment, we respectfully submit that the State in many of its manifestations is indeed involved in public accommodations. Analysis demonstrates that the State is intimately involved in such public accommodations, which are licensed to perform valued public services upon a showing of capacity to serve the public interest, and are governmentally regulated and supported to further the serious public concern in the availability of the services provided. This is illustrated by a brief review of the applicable statutes of Maryland respecting the operation of an establishment such as Glen Echo Amusement Park:

(i) *License*. Under Section 15-7 of the Montgomery County Code (1960), it is made "unlawful for any person to hold in the county any picnic, dance, soiree or other entertainment for gain or profit to which the general public are admitted," without first having obtained a permit or license. By Section 15-8, the County Council is empowered to issue such permit or license upon payment of a reasonable fee, and to adopt "such rules and regulations in connection with such permit, license and fee as are necessary to protect the public health, safety and welfare." By Section 15-11, the Council is empowered to "inspect, license, regulate or limit as to location within the limits of the county any place of public amusement,

or recreation . . . and in order to safeguard the public health, safety, morals and welfare, to pass rules, regulations or ordinances . . .

In Chapter 75 of the Montgomery County Code the Council has promulgated specific regulations (in addition to general rules applicable to matters such as health, fire and sanitation) relative to the licensing and operation of amusement parks, theatres, dance halls, restaurants, cafes, inns, taverns, public swimming pools, etc. These rules prescribe the hours of operation (Section 75-1, 75-2) and other detailed matters. Operation without a license of "amusement parks operated for profit" (Section 75-9) is forbidden (Section 75-5, 75-16). Licenses are issuable by the Director of the Department of Inspection and Licenses (Section 75-6) two weeks after a copy of the application has been published in a newspaper of general circulation (Section 75-7). But no amusement park license may be granted until the park submits proof "of sufficient financial responsibility, or adequate liability insurance coverage, to protect the public using the park" (Section 75-9). Payment of the license fee "entitles the operator of the amusement park" to operate all amusement devices not prohibited by law (Section 75-9). In these licensing and inspection requirements for the protection of the public interest and welfare, the State has manifested its high concern regarding the operation of the amusement accommodations involved. But even after the issuance of the State's approval for the operation of the establishment, continuing State concern is reflected in the system of regulation in the public interest.

(ii) Regulation. Licenses issued expire within one year (Section 75-10). They may be denied, revoked or suspended if the enterprise "constitutes a detriment, is injurious to, or is against the interests of, the public health,

safety, morals or welfare" (Section 75-11).<sup>17</sup> While hearings are provided in cases of revocation and suspension, there is specific authority for the summary closing of the premises to prevent manifest nuisance or danger (Section 75-13). The County reserves its rights of visitation and inspection at the premises (Section 75-15). In these ways, by continual vigilance and inspection, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved.

(iii) *Support.* In the creation and operation of its enterprise, the amusement facility also receives a variety of significant governmental supports. The State first gives it corporate existence and recognition, permitting it to exercise the attributes of a natural person with the privilege of limited liability. Then, with the grant of a permit to operate a public business, the State authorizes the facility to cater and advertise to the general public.

But the State's support does not end with the issuance of corporate charters and public licenses. In a myriad of ways governments provide assistance to public accommodations. Special supports are made available through urban renewal, fair trade protections, anti-trust laws and the like. And assistance is given by outright subsidies and supportive services of Departments of Commerce and Labor. Then, too, there is the vast area of local government assistance—the special zoning and license dispensations, the police protections, and the many daily manifestations of local concern for adequate public facilities. These

<sup>17</sup> Such grounds of disqualification encompass among others (a) defects in the character of the owner or operator, (b) noncompliance with applicable laws and regulations, (c) excessive noise, traffic congestion or other nuisance on the premises, and (d) occurrence or repeated occurrence on the premises of crimes or misdemeanors such as drunkenness or immorality.

varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved—the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

In view of these manifold contacts just reviewed, can it possibly be said that the State has not "become involved" in the operation of public accommodations licensed, regulated, and supported by its agencies? We submit that the points of State involvement are too many and too intimate to allow an affirmative answer in the light of twentieth century relationships between government and public enterprise. Cf. *Public Utilities Com'n v. Pollak*, 343 U.S. 451, 462. But as important as their "state involvement" aspect, these contacts also express the State's recognition of the constitutionally relevant fact that public accommodations are clothed with a vital public interest.<sup>18</sup> Once that fact be recognized, as urged by Justice Harlan in 1883, then vital constitutional principles come into play—those which this Court emphasized in a line of adjudications foreshadowed in *Munn v. Illinois*, 94 U.S. 113, and brought to full standing

<sup>18</sup> This point was aptly put by Senator Sumner during the debate on an 1871 Civil Rights Act amendment. Senator Sumner stated:

"Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; nor is there any difference, whether it be palace or hovel; but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that Equality in all institutions created or regulated by law, is as little a question of society." *Cong. Globe*, 42nd Cong., 2d Sess. 382.

in *Nebbia v. New York*, 291 U.S. 502, and succeeding due process rulings. In the resulting test of government controls against the guarantees of due process, this Court's inquiry no longer ends with the discovery that the enterprise is private, but proceeds on to the question whether the public interest warrants the restraint imposed. This Court has thus definitively accepted Mr. Justice Holmes' view (*Lochner v. New York*, 198 U.S. 45, 75) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." The "private property" concepts which underlay this Court's 1883 refusal to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the presently pending question.

No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases.<sup>19</sup> Considerations of the highest order of public interest are involved in the availability of public services and accommodations without discrimination or segregation—their magnitude is measured by the cataclysmic struggle in which they were forged and the great Emancipation Amendments in which they are enshrined. Yet as long as these guarantees are thought to permit the wholesale denial to Negroes of public accommodations and the amenities of daily life which they provide, the Amendments remain, in Justice Harlan's prophetic words, merely "*splendid baubles*." For it cannot be gainsaid that in many states and localities vital areas of public life still remain foreclosed to Negro citizens. One hundred years after

<sup>19</sup> Cf. St. Antoine, *Private Racial Discrimination*, 59 Mich. L. Rev. 993, 1008-1016.

We are not, of course, suggesting that the due process clause will be applicable in all circumstances and to the same degree as the racial prohibition of the equal protection clause. See note 11, p. 23, *supra*.

Emancipation there is presented in America the spectacle of apartheid communities where Negro citizens are neither truly free nor nearly equal. True, commendable progress is being made to render them free and equal "before the law"; but the effort at true emancipation cannot succeed while great public enterprises operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

*Plessy* and the *Civil Rights Cases* are twin rulings born in an era of retreat from the guarantees of the Emancipation Amendments. After decades of damage to the moving purpose of those guarantees, this Court was induced to abandon the "separate but equal" doctrine, to restore the integrity of governmental involvement in public schooling and to remove a major obstacle to the achievement of a desegregated society. As history has proved Justice Harlan correct in *Plessy*, it has also corroborated his forebodings in the *Civil Rights Cases* about a ruling which, under the guise of "proprietary rights", carved from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations.

Today the moving purposes of the Emancipation Amendments are yet to be fulfilled, while Negro Americans remain social outcasts in the economic and public life of their localities, relegated to the back of the bus in their ride to work and the back alley in their search for lunch hour refreshment. The default on a profound constitutional promise which these realities expose to view, compels a reappraisal of concepts which define Equal Protection so

narrowly as to rob it of its vitality. Such a reappraisal points inexorably to the conclusion that state law must afford the Negro public equal service at places of public accommodation.

### Conclusion

For the reasons herein set forth, the judgment below should be reversed with instructions to dismiss the proceedings against petitioners.

Respectfully submitted,

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